Issue: Group III Written Notice with Termination (patient neglect); Hearing Date: 06/14/12; Decision Issued: 06/19/12; Agency: DBHDS; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 9834; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 07/03/12; Reconsideration Decision issued 07/16/12; Outcome: Original decision affirmed.**

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case No. 9834

Hearing Date: June 14, 2012
Decision Issued: June 19, 2012

## PROCEDURAL HISTORY

Grievant was a direct support professional ("DSP") for the Department of Behavioral Health and Development Services ("the Agency"), with several years of service with the Agency as of the offense date. On March 9, 2012, the Grievant was charged with a Group III Written Notice for patient neglect, with an offense date of February 15, 2012. The discipline was job termination, based on this and a prior, active Group III Written Notice.

Grievant timely filed a grievance to challenge the Agency's disciplinary action, and outcome of the resolution steps was not satisfactory to the Grievant and he requested a hearing. On May 15, 2012, the Department of Employment Dispute Resolution ("EDR") appointed the Hearing Officer. Following a pre-hearing conference, the grievance hearing ultimately was scheduled for the first date available between the parties and the hearing officer, June 14, 2012, on which date the grievance hearing was held, at the Agency's facility.

The Agency submitted documents for exhibits that were accepted into the grievance record, without objection by the Grievant, and they will be referred to as Agency's Exhibits. The parties affirmed at the grievance hearing that the pre-hearing document requests had been satisfied. The hearing officer has carefully considered all evidence presented.

## APPEARANCES

Grievant
Advocate for Grievant
Representative for Agency
Advocate for Agency
Witnesses

## ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

The Grievant requests rescission of the Group III Written Notice, reinstatement, and back pay.

## BURDEN OF PROOF

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this disciplinary action, the burden of proof is on the Agency.* Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . .
> To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on the Standards of Conduct, promulgated by the Department of Human Resource Management, Policy 1.60, which defines Group III Offenses to include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that , for example, endanger others in the workplace and constitute neglect of duty. Agency Exh. 6.

The Agency's departmental instruction, 201(RTS)03, defines neglect and provides the procedure for investigation, etc. The policy specifically provides this definition of neglect:

> This means the failure by a person, program, or facility operated, licensed, or funded by the department, responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of a person receiving care or treatment for mental illness, mental retardation, or substance abuse.

Agency Exh. 6.

Va. Code § 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

> While the hearing officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy..."the hearing officer reviews the facts *de novo*...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action."

## The Offense

After reviewing the evidence presented and observing the demeanor of each testifying witness, the Hearing Officer makes the following findings of fact and conclusions:

The Agency employed Grievant as a DSP, with several years service with the Agency. The Grievant had a prior active written notice (one Group III for another instance of neglect).

The current written notice charged:

> Violation of DI-201; Patient Neglect: You were found to be negligent while on a 1:1 assignment with a patient when [you] failed to carry out the required clinical services as ordered by the Physician. The patient caused injury to self and was sent to the emergency room for treatment.

Agency Exh 2.

The physician's order for the affected patient, stated in the Special Staffing Assignment Sheet, provided 1:1 staffing to address "self-injurious behavior," and to stay within arm's length and maintain "full view" at all times. Specifically, the self injurious behavior was specified to be "inserting objects into penis, cutting, swallowing foreign objects." This patient was to be watched for return of all paper cups; hands not to be covered or under shirt; hands on top of covers. Agency Exh. 3. This patient inserted rolled up paper into his penis, which required emergency medical attention.

The Agency investigator made inquiry and interviewed available witnesses, including the patient, other patients, and other staff members. Through the investigator's interview of the Grievant, as contained in the investigator's report, the Grievant established that the patient went to the bathroom twice on her watch. The Grievant conceded that she did not observe the Grievant's penis when he used the toilet; she stood at the stall door. The investigator's report reflects that the Grievant did not recall reading the patient's Special Staffing Assignment Sheet, but she was aware of the concern over this patient's self-injurious behavior. The paper allegedly came from a magazine another patient surreptitiously passed to the Grievant, although the source of the paper is not considered by the Agency to be relevant to the discipline.

The Agency's chief nurse executive testified that a full view, 1:1 assignment applies to every moment, including bathroom and shower time, and that the Grievant was specifically trained regarding the Agency's expectations for the safety of its wards. Agency Exhs. 3, 5 and 6.

Another DSP testified for the Agency that the full view 1:1 assignment requires having eye contact of entire body, even while in the bathroom or toilet stall.

The Agency's facility director testified to the specific importance of the 1:1 assignments, and that the Agency already mitigated the Grievant's prior Group III Written Notice for neglect to less than termination. Thus, the Agency was unable to mitigate this second Group III to less than termination.

The Grievant elected not to testify at the grievance hearing.

The Grievant's hand-written statement describes the two bathroom visits, and, notably, during the second visit the Grievant describes the stall door was only cracked and she only had view of the Grievant from the waist up.

Two physicians testified on the Grievant's behalf. One testified that this particular patient had a long history of self-harmful behavior; another testified that this patient was bound and determined to hurt himself. A registered nurse called on the Grievant's behalf testified that the 1:1 full view requires just that, without any modesty. She testified that she observes everything while a patient is using the bathroom, without hesitation.

As previously stated, the agency's burden is to show upon a preponderance of evidence that the discipline of the Grievant was warranted and appropriate under the circumstances. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings,* § VI; *DeJarnette* v. *Corning,* 133 F.3d 293, 299 (4th Cir. 1988).

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that the Grievant is guilty of the conduct charged in the written notice. While I apply no negative inference the Grievant's election not to testify, that omission left unrebutted the evidence of interviews and her written statement that support the Agency's conclusion she did not honor the 1:1 full view assignment when the patient was using the bathroom. This was in violation of the assignment and presented opportunity for the patient's unobserved self-harm, regardless of whether such act occurred. Of particular note, the nurse called by the Grievant to testify provided evidence of the expectation of 1:1 full view observation that leaves no "privacy." Without the Grievant's further explanation or embellishment through testimony, there is no evidence to rebut the Agency's case and no opportunity for the hearing officer to make a credibility determination of any countervailing testimony from the Grievant. Based on the evidence presented, I conclude that the Agency has met its burden of proof of the offense and level of discipline.

## Mitigation

The Agency expressed its inability to mitigate the discipline to less than termination because the Grievant already had an active Group III Written Notice—for another instance of neglect. While the Hearing Officer may have reached a different level of discipline, he may not substitute his judgment for that of the Agency when the Agency's discipline falls within the limits of reasonableness. The agency has proved (i) the employee engaged in the behavior described in the termination memorandum, (ii) the behavior constituted misconduct, and (iii) the discipline was consistent with law and policy. Thus, the discipline must be upheld absent evidence that the discipline exceeded the limits of reasonableness. *Rules for Conducting Grievance Hearings* ("Hearing Rules") § VI.B.1.

Termination is the normal disciplinary action for a Group III offense unless mitigation weighs in favor of a reduction of discipline. Under Virginia Code § 2.2-3005, the hearing officer has the duty to "receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Employment Dispute Resolution." Va. Code § 2.2-3005(C)(6). Under the *Rules for Conducting Grievance Hearings,* "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the

agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Under the *Rules for Conducting Grievance Hearings*, an employee's length of service and otherwise satisfactory work performance, standing alone, are not sufficient to mitigate disciplinary action.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In this case, the Agency's action of imposing discipline of termination is within the limits of reasonableness. The Hearing Officer finds no evidence that warrants any mitigation to reduce or rescind the disciplinary action.

## DECISION

For the reasons stated herein, I uphold the Agency's Group III discipline and termination.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance

procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.

Cecil H. Creasey, Jr.
Hearing Officer

# *COMMONWEALTH of VIRGINIA*

## *Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

In the matter of: Case No. 9834

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| Hearing Date: | June 14, 2012 |
| Decision Issued: | June 19, 2012 |
| Reconsideration Issued: | July 16, 2012 |

**RECONSIDERATION DECISION OF HEARING OFFICER**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis …" to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it "newly discovered." Rather, the party must show that:

> (1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

The Grievant seeks reconsideration of the original hearing decision. The request for reconsideration does not identify any newly discovered evidence, but, rather, argues the hearing officer reached incorrect factual and legal conclusions, or misapplied/misinterpreted applicable policy. I consider the issues raised by the Grievant on reconsideration to be the same as those addressed in the original decision.

The Grievant points out conflicting evidence, but the hearing officer originally relied, in part, on the Grievant's written statement that she did not, in fact, comply with the 1:1 order. Given the Agency's evidence of training on 1:1 assignments, the Grievant's written admission of her failure to read the applicable Special Staffing Assignment Sheet, and her written admission that she did not, in fact, keep the patient in full view, the factual question was resolved against the Grievant. Because of the prior, active Group III offense for patient neglect, any mitigating factors, had they resulted in reduction of the level of offense, would still have left a disciplinary record on which the Agency could have terminated the Grievant's employment. A hearing officer, absent very rare circumstances, does not have the power to second-guess the Agency

management decisions that are found to be consistent with law and policy, even if he disagrees with the action. In this case, the Agency's action of imposing discipline of termination is within the limits of reasonableness.

In sum, the Grievant restates the arguments and evidence presented at the hearing, which were resolved against her. For these reasons, the request for reconsideration is **denied.**

## APPEAL RIGHTS

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